United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

ORIGINAL

75-7551

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

B B
P/S P/S

ISMAEL ABU KHADRA, d/b/a THE MIDDLE EAST ELECTRO-MECHANICAL CORPORATION,

Plaintiff-Appellant,

vs.

WESTINGHOUSE ELECTRIC CORPORATION and WESTINGHOUSE ELECTRIC INTERNATIONAL, S.A.,

Defendants-Appellees.

On Appeal From The United States District Court For The Southern District of New York

APPELLANT'S REPLY BRIEF

GEORGE T. MAHSHIE, ESQ.
Attorney for Plaintiff-Appellant
503 East Washington Street
Syracuse, New York 13202

Of Counsel:

John S. Hogg

3

INDEX

TABLE OF CASES CITED

TABLE OF RULES CITED

TABLE OF TEXTS CITED

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

ISMAEL ABU KHADRA, d/b/a THE MIDDLE EAST ELECTRO-MECHANICAL CORPORATION,

Plaintiff-Appellant,

vs.

WESTINGHOUSE ELECTRIC CORPORATION and WESTINGHOUSE ELECTRIC INTERNATIONAL, S.A.,

Defendants-Appellees.

ARGUMENT

I. THE ISSUE BEFORE THIS COURT IS THE PROPRIETY OF THE DISTRICT JUDGE'S DECISION IMPOSING AN IMPOSSIBLE CONDITION UPON RELIEVING PLAINTIFF FROM A HARMLESS DEFAULT

The issue before this Court is the propriety of the condition imposed by the Court below upon relieving plaintiff from the inadvertent default to reply to defendant's counterclaim. Appellee has cited extensive authority, however, to suggest that it was inappropriate for the District Judge to offer to grant relief to plaintiff. The burden of the argument appears to be based upon questions of the form, content

and sufficiency of plaintiff's papers, since none of the allegations made by plaintiff has been met by any contrary allegation of any material fact by defendant.

It is not questioned by any allegation of fact that plaintiff's failure to reply was inadvertent and not intentional. It is not questioned, that by any allegation of fact that plaintiff received no notice of any kind that the default had occurred until defendant moved for default judgment.

It is not questioned by any allegation of fact that the action which plaintiff has commenced, and is actively pursuing against defendant, actually puts in issue questions of whether plaintiff is, in fact, liable for all of the equipment referred to in the counterclaim.

It is not questioned by any allegation of fact that there are great difficulties of communication between plaintiff in Saudi Arabia and his attorney in Syracuse, New York. It is not questioned by any allegation of fact that plaintiff is insolvent - indeed, defendant has made a hearsay allegation to show that that is true -, and it is not questioned by any allegation of fact that plaintiff cannot obtain $25,000.00

cash, or that he cannot obtain a $25,000.00 bond except by putting up the full amount in cash.

Due to the great distance and primitive communication arrangements in Saudi Arabia, where plaintiff lives, it has not been practicable for plaintiff's counsel in all cases to submit complete and detailed affidavits as to all possible material facts by plaintiff himself.

It is submitted that the extensive citations of authority by defendant regarding the necessity for proof of a meritorious defense relate, without exception, to cases where a defendant has been in default in answering a complaint. The requirement of a showing of a meritorious defense is a proper one, insisted upon by the courts in order to prevent harassment and delay of plaintiff's legitimate claims. On the other hand, the question is quite otherwise where the inadvertent default is by a plaintiff, who is pressing and seeking to try a serious claim against the defendant, upon a counterclaim involving many of the same issues. The only similar case which has come to counsel's attention, Tolson vs. Hodge, 411 F. 2d 123 (C.A. 4th, 1969), cited in appellant's brief at Pages 9-10 and 20, pointing out that the meritorious defense to a counterclaim is shown by pleadings.

In any event, it is submitted that more than sufficient showing of a meritorious defense appears in the record to support the District Judge's decision to grant relief to plaintiff. In the first instance, unable to communicate with plaintiff, counsel pointed out that, as in the Tolson case, the allegations of the complaint put the allegation of the counterclaim in issue.

It does not appear that the showing of a meritorious defense needs to be done in any particular form, nor even actually that an affidavit is required. For example, statements in counsel's brief were held a sufficient showing in Nicholson vs. Allied Chemical Corp., 200 F. Supp. 206 (E.D. Pa. 1961).

However, after plaintiff had come to this country, and been deposed by defendant, plaintiff's counsel made an affidavit summarizing plaintiff's sworn testimony, disclosing, among other things, that plaintiff proposes to prove that much of the equipment allegedly delivered to plaintiff was not delivered or did not meet specifications. Defendant's only counter to this is a general allegation of "inaccuracy" - though no inaccuracy is specified -, and the transcript of a self-serving speech made by defendant's counsel

at plaintiff's deposition, to the effect that more discovery is necessary.

No doubt more discovery is necessary - but that plaintiff has and proposes to prove defenses, by way of both denial and avoidance, to the counterclaim is clearly established.

Defendant argues, quite correctly, that, whatever the other issues may be between the parties, if goods were delivered by defendant and accepted by plaintiff, plaintiff is liable to defendant for the prices; and by the same token, that if goods were tendered in accordance with the contract, and improperly refused by plaintiff, plaintiff is liable for the price of those goods. This is true, but to argue it before this Court at this time is to put the cart before the horse.

If, when the case is properly at issue and the parties have their opportunity by discovery or upon trial to resolve the factual issues herein, those are rules which will apply. The issue here, however, is whether defendant is to have the benefit of a judgment without proof, and the plaintiff to be compelled to pay a price for goods allegedly not tendered or delivered in accordance with the contract,

without the opportunity of presenting his defenses.

The Court below understood this quite well, and made orders relieving plaintiff of his default. Incomprehensibly, however, the orders were made contingent upon the posting of a $25,000.00 bond, upon unspecified conditions.

This was the more incomprehensible, in that defendant had not made, nor even attempted to make any serious showing that it was in any way prejudiced by this default. Its purported showing of prejudice was simply a showing that the plaintiff was insolvent. It is not apparent, in the first place, how the fact that a party is insolvent, justifies compelling him to produce $25,000.00 in cash - obviously the only way an insolvent alien could possibly obtain a $25,000.00 bond.

More importantly, however, the relevance of plaintiff's insolvency to his default is not apparent. Whether plaintiff had filed a timely reply or not, his financial status was absolutely unchanged; defendant's prospects in the action were absolutely unchanged; in point of fact, plaintiff's default made absolutely no difference of any kind to defendant, except to hold out a hope that they might somehow, without effort of proof, obtain a judgment to which they might not otherwise be

entitled.

Seemingly, defendant feels prejudiced that plaintiff has sued it. That a poor man sues a rich corporation may be rude and inconsiderate from the corporation's point of view (plaintiff's view is to the contrary), but in no sense does it create a legal prejudice.

Plaintiff's default has put defendant to no expense (it has put itself and plaintiff to great expense by insisting on a techinical default that could have been waived without inconvenience). Plaintiff's default has caused no delay - the action is at issue and proceeding toward trial, (unless delay results from its own actions upon this default). Plaintiff's default has occasioned no change in the relative or the absolute position of the parties vis a vis each other unless the judgment below is affirmed. This would disastrously prejudice plaintiff by immunizing a portion of defendant's breach of contract from inquiry and proof in the pending action.

As Appellee's brief has shown, 6 Moore's Federal Practice (Second Edition) at p. 55-232 recites that a defaulting party "may be required to post security for costs or for the amount of the judgment in appropriate circumstances" [Emphasis supplied]. No doubt this is

true; Moore supports the rule by reference to Thorpe v. Thorpe, (D.C. Cir., 1966) 364 F. 2d 692, where the emphasis was on the "appropriate circumstances": "When such an extraordinary condition is approved it must be accompanied by supporting findings to show that it represents a reasonable exercise of discretion." 346 F. 2d 695. See also Wokan v. Alladin International, Inc., (3rd. Cir. 1973) 485 F. 2d 1232, cited in appellant's brief.

Here, not only has the Court below made no "supporting findings" for the extraordinary requirement of a $25,000.00 bond, but the defendant's papers indicating a patronizing "willingness to accept" the bond has suggested no possible "set of circumstances [to] justify the imposition of a condition that the now disputed claim be made more secure than it was prior to the Court's action", Wokan, supra, 485 F. 2d 1235.

Thus, because defendant made no showing of entitlement to a bond securing part of the judgment that they might obtain, it is respectfully submitted that the record is totally devoid of any logical, legal or factual basis for the imposition of such a bond; even if the record did not show that, because the production of such a bond is impossible to plaintiff, plaintiff is being

unconstitutionally deprived of his day in court.

II. THE DISTRICT JUDGE OUGHT TO HAVE SET ASIDE THE JUDGMENT HEREIN UNDER FRCP 60 (b)

After final judgment was entered herein, plaintiff moved to set aside the default judgment under Rule 60 (b). It is true that, as argued by defendant, the motion to vacate a judgment under Rule 60 (b) is not a substitute for an appeal. However, it would be absurd to suggest that it is not an alternative to an appeal; in that if the District Judge had set aside the judgment under Rule 60 (b), it would have rendered an appeal unnecessary and moot. For this reason, upon the motion under Rule 60 (b), all of the issues which plaintiff's counsel considered relevant to the issue were presented to the District Judge for his reconsideration.

However, the motion was not made as a simple rehashing of the issues previously before the Court, in substitution for appeal as suggested by defendant. Two principal points were raised which had not been before the District Judge prior to his order granting defendant default judgment. The principal issue was the point argued in appellant's brief (and not met by a half hearted proposed stipulation in appellee's

brief) that the entry of a final judgment on the counterclaim will have a destructive effect upon the trial of the plaintiff's case upon the merits, by effectively foreclosing plaintiff from bringing in proof as to the non-delivery by defendant or the non-acceptance by plaintiff of the equipment referred to in the counterclaim.

Again, it does not suffice to say that, by his failure to reply, the plaintiff has admitted the facts in question. In fact, he has not. As found by the District Judge, the failure to reply was inadvertent, and to convert the inadvertent failure to reply into a binding admission of facts which are a basic part of plaintiff's case, is precisely what the case before this Court is about.

If plaintiff actually admits the allegations of the counterclaim, then the entry of the judgment would be of no harm, and the development of the main case would be for a judgment, against which the counterclaim could be set off. It is the very fact that these issues are central to plaintiff's claim that it was hoped would show the District Judge that the default judgment ought not to have been entered, and ought to be set aside.

This question, raising the propriety of the entry of final judgment under FRCP 54 (b) could not properly be raised on appeal, because if successful it would deprive the judgment of finality and therefore oust this Court of jurisdiction; Spencer, White & Prentis, Inc. v. Pfizer, Inc. (2d Cir. 1974), 498 F. 2d 358; so that relief on this ground was available only by motion under FRCP 60 (b).

Secondly, although the insolvency of the plaintiff had been shown to the Court by an affidavit of defendant, and reference had been made to it at earlier proceedings, it was not until the motion under Rule 60 (b) that there was before the District Judge the affidavit of plaintiff himself that he was completely unable to obtain the bond which the Court had demanded as a condition of relieving plaintiff's default; and plaintiff's motion presented this fact to the Judge with a view to setting aside the default, because of the unreasonableness, if not unconstitutionality, of requiring, as a condition of relief, compliance with an impossible condition. This was in the nature of evidence not previously available, and appropriate to grant relief under Rule 60 (b).

Admittedly, it was hoped that the Rule 60 (b)

motion would be successful, in order to obviate the delay, expense, and inconvenience for the parties and for this Court embodied in an appeal - an appeal which would have been unnecessary had the Rule 60 (b) motion been granted.

It is respectfully submitted that on both of the grounds mentioned, the motion under Rule 60 (b) should have been granted, but by the Judge's failure so to do within the time allotted for an appeal this appeal became necessary in any event.

CONCLUSION

It is apparent that the entry of a final default judgment upon the counterclaim herein is a serious miscarriage of justice. Although the District Judge properly found that the default of plaintiff in replying to the counterclaim herein was due to mistake or excusable neglect, he improvidently conditioned relief upon a condition - the posting of a $25,000.00 bond - which was without justification in fact or law in the first instance; and which was evidently unjust, if not unconstitutional, as compliance with the condition was, in fact, impossible for the plaintiff; so that plaintiff was thereby barred from relief to which the Judge had found him to be entitled.

The entry of a final judgment thereafter, embodying a Rule 54 (b) certification unsupported by any findings of fact has had the further unjust effect, not only of depriving plaintiff of his opportunity to be heard on defendant's counterclaim, but of interfering with the possibility of plaintiff's proof of his own claim.

It is respectfully submitted that the whole proceeding herein has been directly contrary to the letter and the spirit of the Federal Rules of Civil Procedure, and most specifically of the provision of Rule 1 requiring that the rules "be construed to secure the just, speedy, and inexpensive determination of every action." Accordingly, it is respectfully urged that this Court reverse the order of the District Judge herein, setting aside the judgment as improperly entered, and authorizing plaintiff to file his reply to the counterclaim herein, together with appropriate costs.

Respectfully submitted,

GEORGE T. MAHSHIE, ESQ.
Attorney for Plaintiff-
Appellant
Office and P.O. Address
503 East Washington Street
Syracuse, New York 13202
Telephone (315) 474-4628

JOHN S. HOGG,
Of Counsel

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ISMAEL ABU KHADRA, d/b/a THE MIDDLE EAST ELECTRO-MECHANICAL CORPORATION,

Plaintiff-Appellant,

vs.

WESTINGHOUSE ELECTRIC CORPORATION and WESTINGHOUSE ELECTRIC INTERNATIONAL, S.A.,

Defendants-Appellees.

AFFIDAVIT OF SERVICE BY MAIL

State of New York)
County of Onondaga) ss:
City of Syracuse)

CATHERINE BOWKA, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 118 Alice Avenue, Solvay, New York. That on the 24th day of January, 1976 deponent served the within Appellant's Reply Brief upon Weisman, Celler, Spett, Modlin & Wertheimer, attorneys for Defendant, Westinghouse Electric Corporation, at 425 Park Avenue, New York, New York 10022, the address designated by said attorneys for that purpose by depositing same enclosed in a postpaid properly addressed wrapper in - a post office - official depository under the exclusive care and custody of the United States post office department within the State of New York.

Catherine Bowka

Sworn to before me this
24th day of January, 1976

George I. Mahoney

Notary Public

GEORGE T. MAHONEY
Notary Public in the State of New York
Qualified in Onon. Co. No. 24-7672777
My Commission Expires March 30, 1976